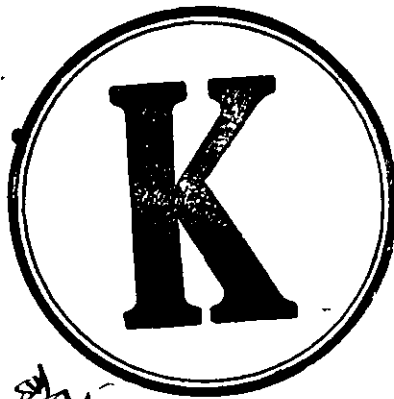


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1947



File No. O. Stamps/47

Legal DEPARTMENT
A BRANCH

Subject:—

Opinions under the

Indian Stamp Act, 1899

P.21
C

File No. O. Stamps/47

Std. Sectt. Slip 24 B. e.

193-A

C O N T E N T S.

Legal Department File No. O. Stamps / 47

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SA.K
9-5-56 .
4 Copies.

SWJ
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Office of the R.J.A.

It is true that the instrument at p. 3 ante which is not registered and has not been executed by both parties is not a valid lease under section 107 of the Transfer of Property Act. But whether it is a lease for purposes of stamp duty will have to be decided with reference to the definition of "lease" under section 2(16) of the Indian Stamp Act 1899. It contains an undertaking to occupy the premises for two years and to pay rent. Consequently the instrument is a lease and would be liable to duty under the Indian Stamp Act. It would therefore be competent to the Rent Controller to impound it under section 33(1) and send it in original to the Collector of Bombay under section 35(2) of the Indian Stamp Act.

G.O; Sd/-

Remembrancer of Legal Affairs.

U.R. to G.O., No. 1280 dated the 7th February 1947.

S.A.K.
9-5-56.

4 Copies.

General Stamp Office.
Bombay 2nd January 1947.

To

The Remembrancer of Legal Affairs.
Bombay.

Subject:- Alembic Distributors Ltd.
Indenture creating fee floating charge.
Section 62(b) of the Indian Stamp Act.

Sir,

With reference to your opinion dated 14th October 1946

copy of which was sent by the Secretary to Government,-----

Revenue Department for my information and guidance. I have to inform you that as per instructions contained therein the Alembic Distributors Ltd. and the Alembic Chemical Works Co. Ltd. were called upon to produce the original indenture. The Alembic Chemical Works Co. Ltd. forwarded the Indenture of Floating charge dated 31-12-45 which bears stamps of Rs. 15/-

2. I may invite your attention to your opinion No. 6910 dated 1st Sept. 1943 wherein you have stated that the Collector can call for a document for inspection only when he is acting under sec. 31 of the Indian Stamp Act and not otherwise. The only authority vested in him by the Stamp Act for action in respect of the insufficiently stamped document is under Section 40 of the Act; but that section can have no application unless the document has been previously impounded under section 33 of the Act. The document in the present case has not come before the Collector in the performance of his functions and so he would not be justified in taking action under Section 33, 40 and 43 of the Act. If the matter goes to the Court, it might be severely criticised.

3. I request you to favour me with your opinion whether the insufficiently stamped document now in my possession should be returned to the party without taking any action upon it and whether I should then institute a suit under section 70 of the Stamp Act requesting the Magistrate to issue summons for the production of the document.

Your obedient servant.

Sd/-

Superintendent of Stamps.

S.A.K.

9-5-56.

4 Copies.

REF No. 498 of 1947

TELEPHONE
No. 27234.OFFICE OF THE PUBLIC PROSECUTOR.
FOR BOMBAY.
51. MAHATMA GANDHI ROAD, FORT.
BOMBAY. 10th March 1947.

FROM

NORSHIRWAN KAVASJI PETIGARA ESQ. B.A.LL.B.J.P.
PUBLIC PROSECUTOR FOR BOMBAY.

To.

Reference Stamp Duty on Indenture
creating a Floating
charge executed by the
Alembic Chemical Works
Ltd.
-----Returned with compliments to the Remembrancer of
Legal Affairs.

2. It appears that there is considerable force in the Collector's remarks that he would not be justified in taking action for the impounding of the document but that he may sanction a prosecution under section 62(b) - or Section 64 (if it is possible to prove that the document was insufficiently stamped with intent to ^{de-fraud} defraud the Government). The commentary of Sir Dinshaw Mulla - See Stamp Act, 4th Edition at pp. 96-97 - gives cases which support this view.
3. It is therefore not worth taking a risk and the more regular course would be for the Collector to return the document to the party and then institute proceedings under Section 62 and /or 64 and request the court to issue a Warrant for the production of the original. Once the --- document is produced before the court an application may be made to the Court for impounding it under Section 33.
4. It appears to me to be quite possible that on the Collector pointing out the under payment of the duty the party might pay up the difference. However that is a matter of expediency and not of law.
5. If a Criminal prosecution is contemplated it would be advisable to keep an exact copy of the instrument before returning it to the party.

. Sd/-

Public Prosecutor for Bombay.

S.A.K.

9-5-56. 401

Letter

No. 3189

Office of the Remembrancer of Legal Affairs.

Bombay Castle. 1st April 1948.

To

The Superintendent of Stamps.
Bombay.

Sir,

With reference to your letter No. 35/S. dated the 2nd /3rd January 1947, I have the honour to forward herewith a copy of the opinion of the Public Prosecutor for Bombay and to request you to take action as suggested therein.

Your obedient servant.

O.C. Sd/-

For Remembrancer of Legal Affairs.

S.A.K.
9-5-56.

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Office of the R.L.A.

A deed of partition is chargeable to Stamp duty as a bond under Article 45 while a deed of dissolution of partnership is liable to a fixed stamp duty under Article 46-B in the Schedule to the Indian Stamp Act, 1899. "Instrument of partition" as defined in section 2(15) means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any Revenue authority or any Civil Court and an award by an arbitrator directing a partition". An acknowledgment of partition is an admission that there has been a partition in the past; it does not effect partition and is therefore not an instrument of partition (see Sakharan Krishnaji v. Madan Krishnaji 5 Bom. 232. Budeh v. Asutosh, 48 Cal. L.J. 279). An instrument of dissolution of partnership has ^{Not} been defined in the Act. In Secretary to the Board of Revenue, Separate Revenue Madaras v. R.M. P.L..N R.N. Agappa Chettiar (1937 I.L.R. Mad 553) the question was whether a document was liable to be stamped as an instrument of partition or as a deed of dissolution of partnership. The document was an award by arbitrators and purported to direct a partition of two firms between the five parties to the deed named therein. Of these five parties Nos. 1 to 3 were undivided members of a family. No. 4 was their distant and separated coparcener and No. 5 was a stranger. The arbitrators after examining orally and working into accounts assigned by casting votes one of the firms with all its assets and liabilities to the first group of parties Nos. 1 to 3 and the other firm to the parties Nos. 4 and 5. It was contended before the High Court that "there being a special article namely Article 46, providing for an instrument of dissolution of partnership, there is no reason why the document in the present case should be held to fall by strained.

S.A.K.
9-5-56.
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construction under the the definition of an instrument of partition." Overruling that contention Varadachariar J. observed:

"This argument ignores the provision in section 6 of the Stamp Act which enacts that wherever an instrument is so framed as to come within two or more of the descriptions in Schedule I and the duties chargeable thereunder are different that document will be chargeable only with the higher of such duties. It is therefore no argument to say that the instrument in question is one relating to the dissolution of a partnership, if according to its terms, it also falls under the definition of an instrument of partition".

Applying that principle to the present case it is to be considered whether the deed though styled as one of dissolution of partnership, falls under the definition of an instrument of partition whereby the co-owners of the partnership property divided or agreed to divide that property in severalty. The operative part of the deed provides:

"As we all thought of not continuing the partnership, we kept our relatives as arbitrators and mutually settled amongst ourselves the accounts of all the businesses mentioned on the 8th day of Ashvin Samvats 2000 that is on Monday, 25-8-1944 and after ascertaining also the profits of all the businesses we have distributed the profits. And as mentioned in this deed we four have wound up the said businesses in partnership in such a way that all the businesses in partnership mentioned above have been closed."

After this the deed goes on to describe how the assets and liabilities of businesses were distributed between the partners. It appears that the deed merely describes the

S.A.P.

shares assigned to each partner and it does not effect a partition. In ~~and~~ other words it does not appear to be deed whereb-y the partners divided the partnership property. Consequently it is not an instrument of partition. It appears to be a deed of dissolution of partnership (see the form of a deed of dissolution at p. 522 of the Encyclopaedia of Forms and Precedents Vol. XI). The view taken by the District Government Pleader is correct although his reasoning is not sound.

Sd/-

O.C. Remembrancer of Legal Affairs.

U.R. to R.D. No. 3366, dated the 7th April 1947.

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Office of the R.L.A.

The practice prevailing in the Kanara Division of taking ferry agreements on stamped paper being in conformity with the provisions of sub-rule (2) of rule 7 of the Bombay Stamp Rules, 1939, may be followed in other Divisions.

Sd/-

19-5

O.C. Remembrancer of Legal Affairs.

U.R. to F.W.D. No. 5137, dated the 20th May 1947.

S.A.W.
8-5-56.
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To

The Superintendent of Stamps.
BOMBAY.

Subject:- Stamp duty on the agreement dated the
1st August 1946.
Bai Janabai M. Patel and others
to
Habib Insurance Company, Limited.

Reference your letter dated the 14th / 17th February
1947 bearing No. 1371/8

The Memorandum of Equitable mortgage enclosed with
your above letter contains an express covenant to pay the
amount of debt and interest and not a mere acknowledgment
or an incidental statement in the declaration as to the
purpose of the deposit as is the case in the usual
precedents in Frederaux (22nd Ed.) Vol. II at pp. 258-259
and Under - hills (Butterworth) "Encyclopedia of Form and
Precedents (2nd Ed.) Vol. X at p. 429. Although your
certificate endorsed on the said Memorandum is conclusive
under section 42 of the Stamp Act, it seems necessary to
point out to you, for your future guidance, that an express
covenant in such an instrument may create an obligation to
pay money and being attested the instrument may become a
"Bond" as defined by section 2(5)(b) of the same act so as
to become chargeable under article 15 in the first schedule.

As regards the subsequent instrument, namely, the
agreement, it appears that the case does not fall within
the provisions of section 4 of the Act by reason of the
fact that the two instruments have not been employed by the
parties to complete one transaction. The transaction of
the deposit of title-deeds is recorded in the Memorandum
of Equitable mortgage and that instrument alone is the
record of the terms of the deposit. The transaction was

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completed immediately on the execution of the Memorandum and nothing further was necessary to complete that transaction. Though the parties had in contemplation the several terms set out in the subsequent instrument at the time of the execution of the preceding Memorandum, the same not having been set out in the Memorandum, the subsequent instrument which embodies them ought to be treated as an instrument evidencing a separate transaction. In fact the subsequent instrument purports to impose on the mortgagors additional liabilities and to confer upon the mortgage additional powers and advantages with the clear intention that the Equitable security created by the deposit of title-deeds should operate as a mortgage of the immovable property to which those title-deeds relate. It will, therefore, be clear that the subsequent instrument evidences a transaction different from the one evidenced by the previous Memorandum.

It should, however, be noted that the subsequent instrument is not entirely independent of the previous instrument so as to be an agreement chargeable under Article 5(c) in the first schedule. It recites the deposit of title-deeds and the Memorandum and clearly states that the terms set out are "in addition to the terms set out in the Memorandum of Equitable Mortgage. The operative part of the subsequent instrument contains a covenant for right to deposit the title-deeds to "mortgaged premises" and also a covenant that the immovable property secured by the said deposit is free from encumbrances and claims". It also contains a covenant to insure "the buildings forming part of the mortgaged premises", with liberty to the mortgagee to insure the same on default by the mortgagors, to pay rates and taxes in respect of the land hereditaments and premises comprised in the Equitable security" and liberty to the mortgagee to pay the same on default by the mortgagors and "during the continuance of this security (subsequent instrument) 2. to pay rent and to observe and perform the covenants and agreements contained in the lease to keep the mortgagee indemnified against all actions. It also contains-

an agreement for three months notice or interest in lieu thereof in the event of the ^{amount} ~~amount~~ being paid after the due date and also a provision that in the event of the Mortgagor committing breach in the Memorandum ^{the} ~~the~~ subsequent instrument the whole amount due and owing under the Equitable security should, at the option of the Mortgagee, become payable immediately.

All these covenants, powers and provisions show that it was clearly ^{the} ~~the~~ intention of ^{the} ~~the~~ parties that the terms of the previous Memorandum should be substantially altered by the provisions of the subsequent instrument. In fact clause 3 clearly states that the "covenants, powers and provisions" are intended to be "applicable by reference" to the Equitable security comprised in the Memorandum. If all those provisions in the subsequent instrument had been included in the Memorandum of Equitable Mortgage, that instrument, as held by Wills ^J in (1898) 1. C. B. ^{at} 363, would by reason of ~~the~~ intention indicated by the said provisions to create a present charge on the immovable property itself have been chargeable as a mortgage and not as an equitable mortgage. In other words it would have lost the special benefit of being treated as an Agreement relating to the deposit of title-deeds so as to be exempted from the operation of Art. 40 and be charged as a mortgage-Deed.

It is, therefore, clear that by reason of the recitals and the reference to the previous Memorandum of Equitable mortgage appearing in the subsequent instrument the original transaction of the Deposit of Title-deeds is incorporated in the subsequent instrument, but the terms of that transaction are substantially altered so as to make the transaction a mortgage of the immovable property and to render the subsequent instrument itself chargeable as a mortgage deed under article 40(b) in

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9-5-56.

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the first schedule.

The Memorandum of Equitable mortgage and the agreement enclosed with your letter under reference are returned herewith.

Sd/-

D.V. Vyas.
Remembrancer of Legal Affairs.

Sd/- R.D.N.

S.A.K.

Office of the R.L.A.

Under the provisions of the English Stamp Act, a document can be stamped after execution on payment of the prescribed penalty, while under the Indian Stamp Act, 1899 a document has to be stamped before or at the time of execution. In India, if an instrument has been stamped insufficiently, before or at the time of execution it cannot be subsequently stamped but has to be certified by the Collector by an endorsement thereon that the proper stamp-duty or the proper stamp-duty and the deficiency, as the case may be, has been levied and such a certificate would be conclusive as against any subsequent objections. The adoption of the English practice of stamping the policy annually by executive orders will not, therefore, fit in with the scheme of the Indian Act. The proper course, therefore, appears to be to undertake the necessary legislation.

The legislation, if undertaken, will be required to

- (a) an amendment of section 2 so as to provide a suitable definition of the term "group policy",
- (b) amendment of section 17 so as to add a further proviso that a group-policy may be stamped annually on the necessary information being furnished by the Insurance Company from time to time and
- (c) an amendment of Article 47 so as to provide a special entry for rates under the heading group-policy.

Such legislation relates to the rate of stamp-duty payable in respect of a group policy which is a policy of insurance. That is a central subject falling under Article 1 in List I in the Seventh Schedule to the Government of India Act, 1935 and hence the Central Government alone can undertake legislation with regard thereto.

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to R.D. No. 6388 dated 24.12.1935.

Office of the R.L.A.

The Transferor Company having chosen to execute a transfer deed in favour of the Bank's nominees and to transfer the shares to the name of the nominees in the record of the Industrial Investment Trust Ltd., the transfer deed was properly stamped with a stamp duty of Rs. 17539-6-0 with which the same was chargeable under Article 62(a) in the First Schedule. Even if the Bank's contention that the nominees were Trustees for the Transferor Company is accepted, a transfer deed executed by a beneficiary or the creator of Trust in favour of a Trustee would be chargeable with the same stamp duty. The duty has been properly paid and the case does not fall under section 52 of or any other provision of the Indian Stamp Act.

It seems necessary to distinguish the case referred in R.D. note from the present case. In that case Associated Cement Co., Ltd., was originally allowed to pay the stamp duty in respect of 75000 share certificates and 15000 letters of allotment in a lump sum of Rs. 17437-8-0 under the provision of section 9(2) of the Stamp Act. The Company issued only 17,547 letters of allotment and there was no likelihood of the Company issuing any further letters of allotment in respect of the particular issue. The Company, however, was desirous of issuing some additional share certificates and requested Government to set off stamp duty already paid on the unused letters of allotment against equivalent number of share-certificates, as the duty chargeable in respect of both the instruments was the same. The Company was allowed the refund subject to the provisions of section 53(c) upon its returning to the Stamp office the unused letters of allotment duly cancelled. In the present case, the transfer form having been already used and acted upon the question of the cancellation of the same does not arise as the same will have to remain on the records of the Industrial Investment Trust Ltd.

However, the Bank has requested Government to grant the refund in the exercise of its inherent powers. There can be no legal objection to the exercise of such powers and to the grant of the refund asked for by the Bank if the Administrative

Department concerned is of opinion that this is a
fit case for the exercise of such powers.

O.C. Sd/-
13-6

Memorandum of Legal Affairs.

U.R. to R.D.No. 6371, dated the 14th June 1947.

S.A.K.
9-5-56.

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Office of the R.L.A.

The view taken by the Superintendent of stamps in his endorsement at page 5 ante is correct. A promissory note being one of the excepted instruments under section 40(1) of the India Stamp Act, 1899 the Collector of Surat had not power to levy the deficit stamp duty and penalty and to issue the certificate in the present case under section 42(1). It is however, for the court to decide whether the promissory note endorsed by the Collector in contravention of the provisions of the Act should be admitted in evidence under section 42(2).

So far as the question of revision of the order of the Collector is concerned, it appears that the Chief Controlling Revenue Authority has no power to interfere. It is true that section 56(1) provides that the powers exercisable by the collector under Chapter IV and chapter V and under clause (a) of the first proviso to section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority and that sections 40 and 42 occur in Chapter IV, but section 56(1) has been interpreted to mean that it refers to pending cases and that after the collector has decided a case and granted a certificate the Revenue Authority has no power to interfere directly-except under section 45 or indirectly under section 57 (See I.L.R. 25Mad. 752, I.L.R. 40 All. 125 and 27Bom. L.R. 273). Section 45 which empowers the Revenue Authority to refund penalty or excess duty in certain cases has no application in the present case. Consequently, the chief controlling Revenue Authority has no power to cancel or interfere with the order made by the Collector of Surat.

Sd/-

15-9

O.C. Remembrancer of Legal Affairs.

U.R. to H.D.No. 9233, dated the 17th September 1947.

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It appears that certain disputes between the contractors of the military and the military authorities in respect of the claims of the former have been referred to arbitration. The question raised for the consideration of the R.L.A. is whether the awards made by the arbitrator in such cases would be exempt from stamp duty under the proviso 1 to section 3 of the Indian Stamp Act, 1899.

2. Under Article 12 in Schedule 1 to the Indian Stamp Act, the awards on a reference made otherwise than by an order of the Court in the course of a suit are liable to stamp duty as prescribed therein. Under section 62, a person executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped, shall be punishable with fine. "Executed" and "execution" used with reference to instruments mean signed and signature (see section 2, sub-section (12)). Reading these provisions together, it would seem that the arbitrator who signs the awards would be primarily liable to see that the awards are properly stamped.

3. The provisions of the Indian Arbitration Act, 1940, are binding on the Crown (see section 45). Under condition 5 of the First Schedule to that Act, the cost of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner such costs or any part thereof shall be paid and may tax or settle the amount of costs to be paid or any part thereof and may award the cost to be paid between legal practitioner and client. The costs of the award include the stamp on the award (see page 164 of law of Arbitration by Faruck). Section 14, sub-section (1), provides that when the arbitrators.

or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. It is, therefore, clear from these provisions that the arbitrator can decide and order which party should bear the cost of the stamp as well as other costs. Ordinarily, a party in whose favour the award is made is entitled to costs. Consequently the party against whom the award is made will have to bear the costs in respect of the stamp for the award. In cases where an award is made in favour of Government, the costs in respect of the stamp would be ultimately borne by the party against whom the award is made while in cases where Government fails, the award would be deemed to be made against Government and the costs in respect of stamp will have to be borne by Government.

4. Under section 3 of the Indian Stamp Act, subject to the provisions of that Act and the exemptions contained in Schedule I, every instrument mentioned in Schedule I is chargeable with the duty of the amount indicated in that schedule as the proper duty thereof. But a proviso is added to that section to the effect that no duty shall be chargeable in respect of any instrument executed by or on behalf of or in favour of the Crown in cases where but for this exemption the Crown would be liable to pay the duty chargeable in respect of such instrument. In cases where the award is made against the Crown, it is difficult to hold that it is executed in favour of the ^{Crown} or executed by or on behalf of the Crown within the meaning of the proviso. The exemption in the Acts of 1860 and 1862 was wider and extended to all instruments to which Government was a party. As the wording stands today, it would, therefore, follow that in either case, whether the award be against the Crown or be in favour of the Crown,

the proviso to section 3 would not be applicable; and
such awards would be liable to stamp duty..

Sd /-
C-12

O.C. Remembrancer of Legal Affairs.

U.D. to R.D. No. 11761. dated the 3th December 1947.

S.A.E.
9-5-56.

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